In capital cases, we are of the view that even if the accused is represented by counsel when he pleads guilty, there must be some indication on record to show that the accused actually knows not only the nature of his plea of guilty to the charge, ie the nature of the capital offence he is pleading to, but also the consequences of his plea, ie there will be no trial and that the sentence of death may be imposed on him even though such sentence is not mandatory.

What was said in *Lee Weng Tuck*[1] is especially applicable in the present case because the amendment Act which imposed the mandatory death sentence had only recently been passed and it is not known that the appellant was aware of the amendment.

The real meaning of a plea of guilty is that the accused agrees to all the ingredients of the offence and all the averments in the charge. Can it be said that this requirement is satisfied in the present case where the word 'traffic' is used in the first two charges although we know that under our law the word 'traffic' is the result of the presumption arising from possession of drugs above the statutory amount? Can it be said then that the appellant here understood the true ingredients of the charge?

There is no indication in the appeal record and the notes of proceedings what was the basis for the acquittal of the second accused and the calling of the appellant to enter his defence except that there is a note to the effect that 'no prima facie case' had been made against the second accused. Since the prosecution evidence, if any, was that of possession, then it is fair to conclude that the appellant was called upon to enter his defence on the presumption of trafficking based on the amount of opium found in the premises.

To summarize, what appears from the record here is that the court in this case accepted the plea of the appellant which is a qualified plea and considered the evidence before him in the light of the plea. This is clear when the learned judge wrote in the notes that the conviction was based on the plea *and* the evidence of the prosecution. This also implies quite clearly that the learned judge could not have based the conviction on the evidence alone.

Where the trial court has accepted an imperfect plea the appellate court may quash the conviction and has a discretion to order or not to order a retrial. In the light of what was stated earlier with regard to the plea, it was our view that the conviction was not a true and satisfactory conviction and should be quashed. In the circumstances of this case we ordered a retrial. Conviction quashed. Retrial ordered.

Order accordingly.

Solicitors: *Paramjit & Co.*

Reported by *Prof Ahmad Ibrahim*

Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-373-90
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND AJAIB SINGH SCJJ
24 JANUARY 1991

Landlord and Tenant — Lease — Lessors occupying property on monthly tenancy after expiry of lease — Property sold by public auction and certificate of sale issued — Tenancy not protected by endorsement prior to date of registration of certificate of sale — Whether purchasers entitled to vacant possession — National Land Code 1965, s 267

Land Law — Lease — Monthly tenancy not protected by endorsement prior to date of registration of certificate of sale — Whether purchasers of property entitled to vacant possession — National Land Code 1965, s 267

Civil Procedure — Order for possession — Whether court has jurisdiction to make order during interlocutory proceeding — Statement of defence not filed — Rules of the High Court 1980, O 33 rr 5 & 21

Civil Procedure — Res judicata — Purchaser's application for possession of property under O 89 dismissed — Appeal abandoned — Final order for possession subsequently made during interlocutory application by tenant — Whether order invalid by reason of res judicata — Rules of the High Court 1980, O 33 rr 5 & 21

Land Law — Licence — Termination — Whether licence terminated by service or issue of writ for proceedings claiming possession.

The appellants were the lessees of a property on which they ran the business of a hotel. The lease was for ten years with an option for renewal. At the expiry of the lease, the option for extension was never exercised but the appellants continued occupation of the said property. Subsequently, the property was sold to the respondents by public auction after a foreclosure action by the chargee of the property. The certificate of sale was duly issued by the senior assistant registrar of the High Court. The respondents thereupon applied for possession of the property under O 89 of the Rules of the High Court 1980 but this application was dismissed in the High Court. The appeal against that order was abandoned.

The appellants later applied for a declaration that they were the lawful tenants of the said property and for a restraining order against the respondents. The restraining order was granted. The respondents then applied to set aside the restraining order and after a hearing inter partes, the learned judge of the High Court discharged the order and also made an order for vacant possession of the property to be given to the respondents. See [1991] 1 MLJ 221. The appellants appealed.

Held, dismissing the appeal:

(1) The earlier judgment of the High Court dismissing the respondents' claim was confined to the facts before the court and limited to the proposition that since the occupants claimed that they were tenants holding over, the summary procedure under O 89 of the Rules of the High Court 1980 was not proper. The question of res judicata or issue estoppel did not arise.

(2) Section 267(2) of the National Land Code 1965 provides that, notwithstanding that it was granted with the consent in writing of the chargee, no tenancy exempt from registration granted by the chargor after the date of registration of the charge shall be binding on the purchaser unless prior to the date of registration of the certificate of sale, the tenancy had become protected by an endorsement on the register document of title.

(3) Since the appellants' lease expired on 21 June 1976 after which they held over as monthly tenants and the charge which resulted in the sale was registered on 15 May 1982, the tenancy would not bind the respondents until the tenancy has become protected by endorsement prior to the date of registration of the certificate of sale. In this case, there was no such protection of the tenancy.

(4) Order 33 r 2 of the Rules of the High Court 1980 empowers the judge to order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, whether raised by the pleadings or otherwise. Order 33 r 5 also provides that if it appears to the court that the decision of any question or issue arising in a cause or matter substantially disposes of the cause or matter or renders the trial unnecessary, the court may dismiss the cause or matter or make such other order or give judgment as may be just. These are ample powers under the Rules for the judge in this case to make the order as he did.

(5) The court agreed with the learned trial judge that the words 'all existing tenancies' in Condition 8 of the proclamation of sale must mean only tenancies protected by the National Land Code 1965. It should be confined to a tenancy endorsed as exempt tenancy under ss 316 and 317 of the National Land Code 1965 prior to the date of registration of the certificate of sale.

(6) Assuming that the appellants are licensees, the service of the writ for proceedings claiming possession was a notice of termination of the licence. Further, the appellants had been served with a notice to quit even before the issue of the summons-in-chambers. This was, as held by the learned judge, more than sufficient notice to a bare licensee.

[Bahasa Malaysia summary

Di dalam kes ini perayu-perayu adalah penerima pajak tanah di mana mereka telah menjalankan perniagaan hotel. Pajak itu adalah untuk masa sepuluh tahun dengan opsyen diberi untuk pembaharuan. Apabila masa pajak itu tamat, opsyen pembaharuan itu tidak digunakan atau didaftar atau diendorskan di dalam Daftar Tanah akan tetapi perayu telah terus menduduk atas tanah itu. Kemudiannya tanah itu telah dijual di lelong awam selepas tindakan mengambil harta itu diambil oleh pemegang gadaian tanah itu dan tanah itu telah dibeli oleh responden. Perakuan penjualan itu telah dikeluarkan oleh penolong kanan pendaftar Mahkamah Tinggi. Responden telah memohon mendapat milik tanah itu di bawah acara ringkas di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 akan tetapi permohonan itu telah ditolak di Mahkamah Tinggi. Rayuan yang dibawa terhadap keputusan itu telah ditinggalkan. Perayu-perayu kemudian memohon deklarasi bahawa mereka adalah penyewa sah tanah itu dan untuk mendapat perintah halangan terhadap responden. Mereka memohon ex parte untuk mendapt perintah halangan itu dan ini telah diberi. Responden telah memohon untuk mengenepikan perintah itu dan selepas mendengar pihak-pihak dalam perkara itu, yang arif hakim Mahkamah Tinggi telah membatalkan perintah itu dan membuat perintah memberi milikan kosong tanah itu kepada responden. Perayu telah merayu.

Diputuskan, menolak rayuan itu:

(1) Penghakiman terdahulu Mahkamah Tinggi menolak permohonan responden dikhususkan kepada fakta-fakta di hadapan mahkamah itu dan terhad kepada pernyataan bahawa oleh kerana penduduk-penduduk itu mendakwa mereka adalah penyewa yang memegang lepas masa acara rinkas di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 tidak sesuai. Soal res judicata atau issue estoppel tidak timbul.

(2) Seksyen 267(2) Kanun Tanah Negara 1965 memperuntukkan sungguhpun ia diberi dengan izin bertulis pemegang gadaian, suatu penyewaan yang dikecualikan dari pendaftaran yang diberi oleh penggadai selepas tarikh pendaftaran gadaian itu, tidak mengikat pembeli tanah itu kecuali jika sebelum tarikh pendaftaran perakuan penjualan, penyewaan itu telah dilindung oleh pengindorsan di dalam dokumen hakmilik pendaftaran.

(3) Oleh kerana pajak responden telah habis tempohnya pada 21 Jun 1976 dan kemudiannya mereka telah memegang lepas masa sebagai penyewa bulanan dan gadaian yang membawa kepada penjualan itu telah didaftar pada 15 Mei 1982, penyewaan itu tidak akan mengikat responden sehingga penyewaan itu telah terlindung dengan pengindorsan sebelum tarikh pendaftaran perakuan penjualan tanah itu.

(4) Aturan 33 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 memberi kuasa kepada hakim memerintahkan mana-mana soalan atau issu yang timbul dari suatu guaman atau perkara, sama ada mengenai fakta atau undang-undang atau sebahagian fakta dan sabahagian undang-undang, sama ada ditimbulkan dari surat guaman atau tidak. Aturan 33 k 5 juga memperuntukkan jika pada pendapat mahkamah keputusan apa-apa soalan atau isu yang timbul di dalam suatu guaman atau perkara dapat menutuskan guaman atau perkara itu secara substantial atau menjadikan perbicaraan tidak perlu, mahkamah itu boleh membuang guaman atau perkara itu atau membuat apa-apa perintah atau memberi apa-apa keputusan yang dipandang adil. Itu semua adalah kuasa yang mencukupi di bawah kaedah-kaedah itu untuk hakim di dalam kes ini membuat perintah yang telah dibuatnya.

(5) Mahkamah bersetuju dengan yang arif hakim bahawa perkataan 'semua sewaan yang ada' di dalam Syarat 8 Pengisytiharaan Penjualan semestinya bermakna hanya sewaan-sewaan yang dilindungi oleh Kanun Tanah Negara. Ia seharus hanya termasuk sewaan yang diindorskan sebagai sewaan terkecuali di bawah ss 316 and 317 Kanun Tanah Negara sebelum tarikh pendaftaran perakuan penjualan itu.

(6) Jika perayu dianggap sebagai pemegang lesen, penyampaian writ untok prosiding menuntut pemilikan ialah notis pemberhentian lesen itu. Perayu juga telah menerima notis keluar sebelum keluaran saman dalam kamar. Ini adalah, seperti yang diputuskan oleh yang arif hakim, notis lebih dari mencukupi kepada seorang yang hanya pemegang lesen.]

Cases referred to

1 *Clarke & Ors* v *Chadburn & Ors* [1985] 1 All ER 211 (folld)
2 *International General Electric Co of New York Ltd* v *Customs and Excise Commissioners* [1962] 2 All ER 398 (folld)
3 *Canas Property* v *KL Television* [1972] All ER 795 (folld)
4 *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang* [1987] 2 MLJ 611 (folld)

Legislation referred to

National Land Code 1965 ss 213(1)(a), 213(3), 228(1)(a), 256, 259(3), *267*
Rules of the High Court 1980 O 33 rr 2, 5, O 89

Appeal from: Civil Suit No 22-202-90 (High Court, Penang)

CV Das (*SP Annamalai* with him) for the appellants.
N Chandran (*N Shanmugam* and *VM Mohan* with him) for the respondents.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): To appreciate fully the real issues raised in this appeal it is best that the background facts of the case be set out first. In their chronological order they may be stated briefly as follows.

The disputed property (hereinafter referred to as the 'said property') is premises No 55 on lots 366 and 368, TS 19, NED Penang, on which stands an 11-storey building. The appellants, proprietors of Hotel Ambassador, entered into possession of the said property to commence the business of a hotel called Hotel Ambassador. The appellants went into possession of the said property pursuant to a lease and annexure dated 2 January 1967 executed between the appellants and the proprietors of the said property.

The annexure to the lease provided for the rental to be paid by the appellants at $11,000 per month. Clause 4(e) of the annexure contained provisions for renewal after determination of the first ten years for a further period of ten years on monthly rental of $12,000 and a further period of ten years at monthly rental of $13,000. The first initial period of ten years expired on 21 March 1976.

The option for extension of the lease subsequent to the initial period was never exercised or registered or endorsed in the land register and the appellants continued occupation of the said property.

The appellants must have been undergoing a financial strain some time in the early 80's as can be seen from Civil Suit No 287/89 commenced against them by the previous owners of the said property. The suit was for the recovery of arrears of rental in respect of period February 1984 to May 1989 amounting to $756,000. The writ also asked for vacant possession. On 3 March 1990 the previous owners obtained judgment for the said sum of $756,000 but abandoned the claim for possession.

In the meantime the said property had been charged to a finance company, Malayan United Finance Bhd. Subsequently, foreclosure action was taken under the charge.

A company, Seapower (M) Sdn Bhd, the respondents now, purchased the said property at a public auction under the National Land Code 1965. The public auction was held on 26 July 1989 pursuant to an order of sale dated 14 August 1986 made by the High Court, Penang, in Originating Summons No 777/85.

Upon respondents paying the whole purchase price of $6,000,000, the certificate of sale in Form 16F was issued by the senior assistant registrar, High Court, Penang, on 8 December 1989 under s 259(3) of the National Land Code 1965 which certificate was under the same provision registrable as if it were an instrument of dealing.

The proclamation of sale contained, inter alia, the following conditions of sale:

> (8) The properties are sold subject to all existing tenancies, if any, and all claims of tenants and occupiers by contract, custom statute or otherwise.
>
> (12) Upon payment of the balance of the purchase money the purchaser shall be let into possession or the receipt of the rents and profits of the properties.

On 16 February 1990, the respondents took out an Originating Summons No 113/90 claiming possession of the said property under O 89 of the Rules of the High Court 1980. After hearing arguments, Wan Adnan J dismissed the application. Subsequently, the appeal against that order was abandoned.

On 29 May 1990, the appellants took out a writ against the respondents in Civil Suit No 22-202-90. In the statement of claim the following reliefs were sought:

(a) a declaration that they were the lawful tenants of the said property;
(b) an order to restrain the respondents from interfering with or disturbing their lawful and actual possession and use of the disputed property; and
(c) damages and costs or such other further order or relief as may be just or necessary.

On 20 May 1990, the appellants took out summons-in-chambers seeking for the order of restrain. The application was subsequently heard ex parte and a restraining order was granted with the usual undertaking as to damages. The application to set aside the restraining order was heard inter partes on 15 June 1990 whereupon it was adjourned to 16 June 1990 and then to 4 July 1990 and then to 8 September 1990 for further submissions by counsel. After hearing arguments the learned judge, Edgar Joseph Jr J, made the following orders:

> Accordingly, I discharged the interlocutory injunction dated 29 May 1990 made in favour of the occupants and granted the declaration for vacant possession prayed for by the purchasers. Upon the purchasers going into possession of the disputed property the occupants were to be restrained from interfering with the purchasers' peaceful possession thereof. Damages were to be assessed and paid by the occupants upon enquiry by the senior assistant registrar and the purchasers were to have the costs of the proceedings.

Subsequently, counsel appeared before the learned judge and the learned judge exercised his powers under the slip rule and varied the declaratory order so as 'to require the occupants to deliver vacant possession forthwith to the purchasers'. In his grounds of judgment the learned judge also recorded that for the avoidance of doubt, he ordered that 'such damages as are found by the senior assistant registrar to be payable by the occupants shall be paid to the purchasers'. [See [1991] 1 MLJ 221.]

The attack by the appellants against the judgment of the learned judge may be conveniently classified under two general headings. The first is jurisdictional. The second is the interpretation of the relevant conditions of sale, in particular Condition 8 reproduced earlier in the judgment.

On the question of jurisdiction the following issues were raised. First, it is the appellants' contention that the claim for vacant possession before Edgar Joseph Jr J was barred by res judicata or issue estoppel because of the earlier decision of Wan Adnan J and the subsequent withdrawal of the appeal against that decision. Secondly, it is also the appellants' contention that the learned judge had no jurisdiction to make the order of possession on an interlocutory application. It is said that such an order can only be made in a final judgment which means after a trial or by summary judgment or an order striking out the defence and entering judgment for the plaintiffs. In this case it is not disputed that when the learned judge heard the application to set aside the restraining order the statement of defence had not even been filed.

As regards the question of the interpretation of Condition 8, it is the appellants' contention that the interpretation by the learned judge is unduly restrictive and not warranted by the language used in the clause. According to the appellants the learned judge restricted the meaning of tenancy to tenancy protected by endorsement under the National Land Code 1965. It is argued that the court should look at the status of the appellants at the time of the auction sale.

The appellants contend that the words 'existing tenancies' refer to a tenancy arrangement existing between the previous owners and the occupiers at the time of the auction sale and it should not be confined to only a registered or protected tenancy under the registered or protected tenancies under the National Land Code 1965.

In our view the earlier decision of Wan Adnan J must be understood in its proper context. What was before the learned judge then was an application for possession under O 89 of the Rules of the High Court 1980. It was a summary procedure. Because of the point raised by the appellants purporting to be tenants there and that they were in lawful occupation of the said property, Wan Adnan J declined to proceed under O 89 and dismissed the application. It must be understood that he did not finally decide the status of the appellants. What he decided was simply that on the facts as shown to him a summary procedure was not proper. It would appear at the outset of the hearing before Wan Adnan J, counsel for the tenants submitted a preliminary point that the summary procedure under O 89 was not available in the circumstances of the case. The learned judge agreed and dismissed the application with costs.

The observations made by Wan Adnan J in his grounds of judgment that the tenants were 'tenants holding over' were mere observations and made obiter and not a finding arrived at on the merits. In fact in his careful judgment, Edgar Joseph Jr J considered the ratio decidendi of the judgment of Wan Adnan J and we agree that the latter's judgment was confined to the facts before him and limited to the proposition that since the occupants claimed they were tenants holding over, a summary procedure under O 89 was not proper. Therefore, the question of res judicata does not really arise.

On the question of issue estoppel we agree with the learned judge that on the facts of this case the appellants cannot invoke the doctrine of issue estoppel. There can be no estoppel as against statutory provisions. It is not disputed that the application for renewal according to the renewal clause under the annexure to the lease in question was never exercised by the appellants. Under the lease they had six months before the expiry of their tenancy to give notice in writing of their desire to renew. It is not disputed that the appellants continued to be in occupation after the expiry of the initial term of ten years without ever exercising the option either in the manner or within the time specified in the lease or at all.

Section 228(1)(a) of the National Land Code 1965 provides, inter alia, that a lease may confer on the lessee an option exercisable *before* the expiry of the term of the lease to require the grant to him of a tenancy for a further term. The lease in this case carried such a provision for the option but it was never exercised by the appellants. What actually happened was that upon the expiry of the initial term of ten years under the lease the appellants continued to occupy the said property on what must be a monthly tenancy since the rental was payable with reference to the month. This must and can only be the correct conclusion because as stated earlier in the judgment the previous owners had sued for the recovery of arrears of rentals in respect of period February 1984 to May 1989 amounting to $756,000 and for vacant possession.

Much has been said about the question of the previous owners having obtained judgment for the arrears of rental and then abandoning their claim for posses-

sion. It must be understood that by then the ownership of the said property had already passed to the respondents. It is not correct to say that the abandoning by the previous owners of the claim for possession should be construed so as to create a further tenancy for they were then no longer the registered owners of or have any interest in the said property.

Section 267 of the National Land Code 1965 provides for the effect of sale pursuant to an order of sale made by the court under s 256 of the Code. Section 267 states that any certificate of sale given to a purchaser under s 259(3) of the Code should be treated for all purposes under the Code to be an instrument of dealing and shall be registrable and upon registration thereof the title or interest of the chargor shall pass to and vest in the purchaser, freed and discharged from all liability under the charge. Section 267(2) further provides that notwithstanding that it was granted with the consent in writing of the chargee, no tenancy *exempt from registration* granted by the chargor after the date of registration of the charge shall be binding on the purchaser unless prior to the date of registration of the certificate of sale, the tenancy had become protected by an endorsement on the register document of title. This statutory provision is crucial in this case because it is not disputed here that there was no endorsement of any tenancy.

Since the appellants' lease expired on 21 June 1976 after which they held over as monthly tenants and the charge which resulted in the sale was registered on 15 May 1982, the tenancy would not bind the respondents until the tenancy has become protected by endorsement prior to the date of registration of the certificate of sale.

Section 267(2) of the Code is an explicit statutory provision and its language clearly requires it to be strictly enforced.

The next question is to consider whether the judge was correct in making the order as he did in what appears to be an interlocutory proceeding when the statement of defence had not been filed. We are of the view that the issue is lacking in substance and merit.

First, it must be noted here that based on the admission of both parties the learned judge was satisfied that there was no dispute as to the facts and the only point for consideration for him was the question of law, that is, whether the appellants were *lawful tenants* of the said property or were they *trespassers*.

We are of the view that it was within the learned judge's jurisdiction to make a final order of possession in this case. Order 33 r 2 of the Rules of the High Court 1980 empowers the judge to order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, *whether raised by the pleadings or otherwise*. Order 33 r 5 also provides that if it appears to the court that the decision of any question or issue arising in a cause or matter *substantially disposes of the cause or matter or renders the trial unnecessary*, the court may dismiss the cause or matter or make such other order or give judgment as may be just. These, in our view, are ample powers under the Rules for the judge in this case to make an order as he did.

In *Clarke & Ors* v *Chadburn & Ors*,[1] Sir Robert Megarry V-C had a motion before him. In that case the officials of a trade union intended to propose at a conference of the union that the union's rules be altered with regard to disciplinary powers over members of the union. On the day before the conference the plaintiffs, who were members of the union opposed to the change in the rules, applied ex parte for an order restraining the defendants, namely, the officials of the union, from putting, proposing, allowing to be put or proposed, voting on or passing at the conference any resolution proposing an alteration of the rules aforesaid. The court granted the order but gave the defendants liberty to apply to discharge or vary it. In disregard of the court order the defendants put to the vote at a conference the proposed alterations to the rules and the resolutions were passed by two-thirds majority required to effect a change in the rules. The plaintiffs applied for a declaration that the resolutions were void and not binding on the plaintiffs. Megarry J in that case established what was obiter in *International General Electric Co of New York Ltd* v *Customs and Excise Commissioners*[2] and held that the court had jurisdiction in interlocutory proceedings to make a final, and not merely an interim, declaration affecting the rights of a party, but that jurisdiction would only be exercised sparingly and infrequently. Megarry J found that since the plaintiffs' motion raised an issue which was a matter of public concern affecting the rights of members of the union, the court was justified in making a final declaration in the terms sought by the motion. In *International General Electric Co of New York Ltd* v *Customs and Excise Commissioners*,[2] Upjohn LJ with the concurrence of Diplock LJ rejected the concept of an interim declaration but envisaged the possibility that in certain cases it might be proper to make a declaration of rights in interlocutory proceedings, though this jurisdiction would be infrequently and sparingly exercised. Such a declaration their Lordships ruled would finally determine the point, and would not operate only as a declaration for the interim. The facts of the instant case fully justify the learned judge to make the orders as he did.

Finally, there is the question of interpretation of Condition 8, whether it should be confined only to a tenancy endorsed as exempt tenancy under ss 316 and 317 of the Code prior to the date of registration of the certificate of sale referred to earlier.

Under s 213(1)(a) of the Code 'tenancy exempt from registration' means any tenancy or sub-tenancy for

a term not exceeding three years granted pursuant to s 223 of the Code, ie granted by the *proprietor* of any alienated land, by any *lessee* or *sub-lessee* for the time being and by any person holding under such tenancy or sub-tenancy.

We agree with the learned judge that the words 'all existing tenancies' must mean only tenancies protected by the Code. We adopt as the learned judge did what Dr David Wong said in his book *Tenure and Land Dealings in the Malay States* at p 415 when referring to s 213(3) of the Code that ' ... unless so protected, a tenancy exempt from registration, granted after the commencement of the present Code will be defeated not only by a subsequent registered dealing but also by a subsequent statutory lien and even a subsequent tenancy both the later being non-registrable'.

In conclusion, what is therefore the status of the appellants vis-a-vis the disputed property? According to the learned judge they are trespassers, or at most, bare licensees based on the facts stated earlier. Assuming they were licensees the service of the summons-in-chambers itself was a notice of termination of the licence. The case of *Canas Property* v *KL Television*[3] is authority for the proposition [at p 799] that the service of proceedings claiming possession makes the person on whom the proceedings are served trespassers. In the Court of Appeal (Lord Denning MR, Fenton Atkinson and Megaw LJJ) the question raised was, if a landlord brings an action for forfeiture when does the lease come to an end, when the writ is issued or when it is served? It was held that:

> A lessor does not effect a forfeiture merely by issuing a writ for possession against a lessee or assignee who is in breach of covenant. It is the service, not the issue of the writ which is equivalent to re-entry and effects a forfeiture; and the lease is determined from the date of service.

In fact prior to the issue of the summons-in-chambers in this case the appellants had notice when the respondents' former solicitors served them with the notice to quit dated 20 November 1989 requiring them to deliver vacant possession within 14 days from the date of receipt thereof which the learned judge held to be more than sufficient notice to a bare licensee. We agree.

In a much misunderstood judgment of this court in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors* v *Poh Swee Siang*[4] which had brought about contempt proceedings, the stand of our courts with regard to trespassers and the rights of persons entitled to possession is set out in the judgment at p 618 as follows:

> Our courts have consistently subscribed to the principle that one who has the right to enter upon another's land and act in excess of this right or after his right has expired is a trespasser — see *Sidek bin Hj Muhammad and Letchumi Ammal* v *Nam Fong Housing Sdn Bhd* [1982] 2 MLJ 19. Both these cases were decided by the former Federal Court and both appeals were heard about the same time by different quorums in early February and March 1982.
>
> Sections 7 and 8 of our Specific Relief Act 1950 should be read conjunctively. Section 8(1) of the Act clearly implies the remedy of self-help. Section 8(1) presupposes a person entitled to possession but is dispossessed contrary to his rights. It is understood that the landlord if he recovers possession otherwise than by the normal process of court action opens himself to the risk of being sued by the person dispossessed. That is the risk he must take.

Having gone through the careful judgment of the learned judge we detect no error in law or jurisdiction in his conclusions and orders. The appeal is accordingly dismissed with costs here and below.

Appeal dismissed.

Solicitors: *Annamalai & Co; VM Mohan.*

Reported by *Prof Ahmad Ibrahim*

Credit Corporation (M) Bhd v Fong Tak Sin

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-88-1990
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND AJAIB SINGH SCJJ
24 JANUARY 1991

Civil Procedure — Limitation — When cause of action accrues — Application to add party as defendant to suit — Whether application barred by limitation — Limitation Act 1953, s 6(1)(a)

The respondent, a taxi driver, was injured in an accident between his taxi and another motor vehicle on 18 June 1979. On 16 June 1984 the respondent took out a writ claiming special and general damages. Subsequently, on 15 August 1984 the solicitors for the respondents were informed that the appellant claimed to be the owners of the vehicle. The present solicitors for the respondents applied four years later to add the appellant as the third defendant in the suit. The issue before the learned judge was whether the respondent's application was barred by limitation. The learned trial judge held that time did not run against the respondent until the date he becomes aware that the appellant was the registered owner of the vehicle, that is, on 15 August 1984. He therefore allowed the application. The appellant appealed.

Held, allowing the appeal:

(1) It is established that the cause of action normally accrues where there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed. In the present case the relevant date is 18 June 1979, when there existed the person in existence who can sue, that is the respondent, the person in existence who can be sued, the appellant, and the facts to be proved by the respondent to entitle him to succeed in the action.

(2) The provision of s 29(c) of the Limitation Act 1953, is applicable only where the mistake is an essential ingredient